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No. 448

*In the*

# Supreme Court of the United States

OCTOBER TERM 1947

**PEGGY SHADE, FULL-BLOOD CHEROKEE INDIAN, ROLL No. 14147**

VERSUS

**LUCY DOWNING, NOW FOSTER, NANCY DOWNING, NOW TAYLOR, AND POLLY DOWNING NOW WILLIAMS.**

**On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.**

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# In the SUPREME COURT OF THE UNITED STATES

OCTOBER TERM 1947

No. 448

PEGGY SHADE, FULL-BLOOD CHEROKEE INDIAN, ROLL No. 14147

*vs.*

LUCY DOWNING, NOW FOSTER, NANCY DOWNING, NOW TAYLOR, AND POLLY DOWNING NOW WILLIAMS.

On Certificate from the United States Circuit Court of Appeals for the Tenth Circuit.

## Brief for Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams.

### JURISDICTION.

In this case the United States Court of Appeals for the Tenth Circuit, acting under Section 239 of the Judicial Code, 28 USCA Section 346, 8 FCA Title 28, Section 346, has certified a question of law upon which it desires the instruction of this Court for the proper decision of the cause.

### QUESTION CERTIFIED.

Is the United States a necessary party to a proceeding to determine the heirship of a deceased citizen allottee of the Five Civilized Tribes brought under the Act of June 19,[1] 1918, 40 Stat. 606? (Cer. 3)

[1]The correct date is June *14*, 1918.

## STATUTE INVOLVED.

The Act of June 14, 1918, 40 Stat. 606 (25 USC Sections 355, 375, set forth in the Appendix, *infra*, pp. 9-10.

## STATEMENT.

The facts upon which the certified question of law rests are stated in the *Certificate* as follows:

"A tract of land situated in Rogers County, Oklahoma, was allotted to Thompson Downing, a full blood Cherokee (fol. 2) Indian enrolled opposite Roll No. 14644. Thompson Downing died intestate in Cherokee County, Oklahoma, on March 17, 1934. Thompson Downing and Sallie Downing lived together as husband and wife until sometime after 1908, when Thompson Downing left Sallie Downing. To the marriage between Thompson and Sallie Downing three daughters were born, Lucy Downing, now Foster, Nancy Downing, now Taylor, and Polly Downing, now Williams. On February 21, 1916, a marriage license was issued to Thompson Downing and Polly Manus. On February 22, 1916, a marriage ceremony was performed between Thompson Downing and Polly Manus. They, thereafter, lived together as husband and wife. No children were born, the issue of that marriage. Sallie Downing died November 3, 1920, and Thompson Downing and Polly Manus continued thereafter to live together as husband and wife until the death of Thompson Downing. Polly Manus died intestate, without issue, April 20, 1934, leaving Peggy Shade, a sister, as her only heir.

Lucy, Nancy and Polly Downing, now Williams, filed a (fol. 3) petition in the county court of Cherokee County, Oklahoma, to determine the heirs of Thompson Downing, under the Act of June 19, 1918, 40 Stat. 606. Thereafter, on January 4, 1935, a decree was entered in such proceeding by which it was adjudged that the three petitioners were the sole and only heirs of Thompson Downing, deceased, and that each inherited an un-

divided one-third interest in the property of which Thompson Downing died seized. No notice of the pendency of the proceeding to determine the heirs of Thompson Downing, deceased, was served upon the Superintendent for the Five Civilized Tribes, pursuant to §3 of the Act of April 12, 1926, 44 Stat. 239, 240.

Peggy Shade brought this action against Lucy, Nancy, and Polly Downing, now Williams, in the District Court of Cherokee County to recover possession of an undivided one-fourth interest in such allotted lands, to quiet title to such interest, and for an accounting of the rents and profits therefrom. In her complaint, she alleged the facts (fol. 4) above stated; that Polly Manus, as the surviving wife of Thompson Downing, deceased, inherited one-fourth of the property of which Thompson Downing died seized, and that she inherited such interest as the sole heir of Polly Manus, deceased. She challenged the validity of the decree of heirship on the grounds: that Polly Manus was not named in the petition for determination of heirship and was not served with notice of the proceeding to determine heirship; that notice of the pendency of such proceeding was not served upon the Superintendent for the Five Civilized Tribes; and that extrinsic fraud was practiced by the defendants below upon Peggy Shade. Notice of the pendency of this action was served upon the Superintendent for the Five Civilized Tribes in the manner prescribed by §3 of the Act of April 12, 1926. Thereupon, the cause was duly removed to the United States District Court for the Eastern District of Oklahoma. From a judgment in favor of the defendants below, Peggy Shade has appealed. The United States did not join in such appeal." (Cer. 1-2)

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[1]The correct date is June *14*, 1918.

## ARGUMENT.

**The United States is not a necessary party in proceedings to determine heirship of a full-blood Indian of the Five Civilized Tribes.**

### A. *No governmental interest is involved in a determination of heirs.*

Congress vested in the probate (County) courts of Oklahoma jurisdiction to determine heirship of deceased full-blood Indians. Section 1, Act of June 14, 1918 (appendix, *infra*,, pp. 9-10). Section 2, Act of June 14, 1918 (appendix, *infra*, p. 10), vested jurisdiction in Oklahoma courts to partition restricted lands. In *United States* v. *Hellard*, 322 U. S. 363-369, it was conceded by the United States, petitioner therein, "that the United States is not a necessary party to proceedings to determine heirship under Section 1 of the Act of June 14, 1918." The *Hellard* case invalidated a sale in partition because the United States was not made a party to the partition suit.[1] Contrasting the interpretation of Section 1, providing for determination of heirship, with Section 2, providing for partition, this Court in the *Hellard* case said:

> "Since restrictions on alienation do not prevent inheritance, no governmental interest is at least directly involved in such a determination. It may likewise be inferred from the language, nature, and purpose of Acts of Congress which vest jurisdiction over specified Indian affairs in a designated court that Congress not only has made that tribunal the exclusive agency to ef-

[1]The holding in the *Hellard* case was based upon the interest of the United States in preserving the restricted character of the land involved; in safeguarding the Indians' interest in the land, whether partitioned in kind or sold. The Government's concern was noted to extend further to the reinvestment of the proceeds in other lands, tax exempt and restricted, and to protect the preferential right of the Secretary of the Interior to purchase the land for another Indian.

fectuate the federal policy but also has dispensed with any requirement that the United States be a party to the proceedings."

The above quotations justify the conclusion that the government and this Court have concluded the United States is not a necessary party to heirship proceedings under Section 1 of the 1918 Act. The determination of heirship does not directly affect the restrictions on the land or the land itself, any interest of the government is not therefore involved. In the light of the *Hellard* decision only a negative answer can be given to the question certified.

**B. *Congressional intent negatives the necessity of the United States as a party to heirship proceedings.***

The authority of Congress to select state tribunals to act as administrative agencies in furthering congressional policy is clear. *Parker* v. *Richard*, 250 U. S. 235, *United States* v. *Hellard*, *supra*. It was essential that jurisdiction be vested in an agency of the Government to conclusively settle questions of heirship, *State, ex rel. Miller* v. *Huser*, 76 Okl. 130, 184 P. 113[2]. The finding and determination of heirship by County courts of Oklahoma, administrative agencies of the Government, are conclusive. Such decrees are analogous to adjudication of isssues involving the enrollment right of an Indian, *United States* v. *Wildcat*, 244 U. S. 111, and age and quantum of Indian blood of members

[2]It is within the power of Congress to say, in the first instance, what law of descent shall control restricted lands, and it is certainly within congressional power to entrust administrative officers with the finding of facts necessary to effectuate its purposes, and to provide for a determination of heirship as a question of fact, which simply amounts to a declaration of the persons on whom the law casts the succession—it finds a fact and fixes a status. *State, ex rel. Miller* v. *Huser, supra.* Cf. *McDougal, et al.* v. *Black Panther Oil and Gas Company et al.*, 273 F. 113-119; *Pitman* v. *Commissioner of Internal Revenue*, 64 F. (2d) 710 (10th Cir.).

of Indian tribes as authorized by Section 3 of the Act of May 27, 1908 (35 Stat. 312).

Congress designated the County courts to determine heirs as it might have designated the Superintendent for the Five Civilized Tribes. Cf. *Parker* v. *Richard, supra.* The County court is a probate court and was well qualified to act as a federal agency under designation by Congress to determine the heirs of restricted Indians. Theretofore Congress had entrusted to such courts authority to approve conveyances of full-blood Indians under Section 9 of the Act of May 27, 1908 (35 Stat. 312), thus substituting the County court for the Secretary of the Interior, who formerly performed the same function. See Act of April 6, 1906, Section 22 (34 Stat. 137). *Parker* v. *Richard, supra; Harris* v. *Bell,* 254 U. S. 103; *Stewart* v. *Keyes,* 295 U. S. 403.

Procedure is provided by Section 3 of the Act of April 12, 1926, c 115 (44 Stat. 239), to remove a suit pending in a state court to the United States court on petition by the United States within a limited time after service of notice upon the Superintendent for the Five Civilized Tribes. This Act was intended to include a "suit" or "cause" and did not authorize the removal of a probate proceeding. *In re Micco's Estate,* 59 F. Supp. 434[3].

Congress, in recent legislation, has indicated the construction of Section 1 of the Act of June 14, 1918, by this Court in the *Hellard* case, and the interpretation of Section

[3]Following judgment ordering remand of an administration proceeding on the estate of Peter Micco, restricted Indian member of the Five Civilized Tribes in Oklahoma, this Court in *United States* v. *Rice,* 327 U. S. 742-755, declined to decide that the Circuit Court of Appeals for the Tenth Circuit was authorized by mandamus to review the judgment of the district court, *supra,* remanding the administration proceeding to the state court. Proceedings to determine heirship under section 1 of the 1918 Act are "special proceedings." *In re Jessie's Heirs,* 259 F. 694; *In re Morrison's Estate,* 187 Okl. 553, 104 P. (2d) 437.

3 of the Act of April 12, 1926, in the *Micco* case, were expressive of Congressional intent.[4]

### C. *In a contest between full-blood Indians the United States has no interest in the result.*

The Certificate shows that "the United States did not join in such appeal" (Cer. 2) to the United States Circuit Court from which the certified question is brought here. All parties to this appeal are full-blood Indians of the Five Civilized Tribes in Oklahoma. The Government has an equal duty to all parties to this action. Recognizing that it could not become an advocate in behalf of either party the Government declined to participate in this suit. The right of the Government to appear in litigation affecting its wards is reserved for its exclusive benefit. Such right cannot be asserted by a private litigant. Peggy Shade in this litigation cannot claim a right of the United States.[5]

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[4]Public Law 336, 80th Congress, Chapt. 458, 1st Session, approved August 4, 1947, provides in part in Sec. 3(a) as follows: "The State courts of Oklahoma shall have exclusive jurisdiction * * * of all actions to determine heirs arising under Section 1 of the Act of June 14, 1918 (40 Stat. 606)" and (b) "the United States shall not be deemed to be necessary or indispensable party to any action or proceeding of which the State courts of Oklahoma are given exclusive jurisdiction by the provisions of subsection (a) of this section * * *."

[5]In *Hy-Yu-Tse-Mil-Kin* v. *Smith*, 194 U. S. 401-415, it is said at pages 412-413: "Another objection is made that the United States is a necessary party defendant, and, not being before the court, no binding decree can be entered herein. The contest here is between two Indians, each claiming the same land under an allotment which was made last to the appellant herein. The United States has no interest in the result. Both parties are Indians claiming under the act of 1885. In our opinion, the claim that the United States must be made a party is without foundation."

The certified question should be answered in the negative.

Respectfully submitted,

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## APPENDIX.

The Act of June 14, 1918, 40 Stat. 606, 25 USC Sec. 355, 375, is as follows:

An Act to provide for a determination of heirship in cases of deceased members of the Cherokee, Choctaw, Chickasaw, Creek, and Seminole Tribes of Indians in Oklahoma, conferring jurisdiction upon district courts to partition lands belonging to full-blood heirs of allottees of the Five Civilized Tribes, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That a determination of the question of fact as to who are the heirs of any deceased citizen allottee of the Five Civilized Tribes of Indians who may die or may have heretofore died, leaving restricted heirs, by the probate court of the State of Oklahoma having jurisdiction to settle the estate of said deceased, conducted in the manner provided by the laws of said State for the determination of heirship in closing up the estates of deceased persons, shall be conclusive of said question: Provided, That an appeal may be taken in the manner and to the court provided by law, in cases of appeal in probate matters generally: Provided further, That where the time limited by the laws of said State for the institution of administration proceedings has elapsed without their institution, as well as in cases where there exists no lawful ground for the institution of administration proceedings in said courts, a petition may be filed therein having for its object a determination of such heirship and the case shall proceed in all respects as if administration proceedings upon other proper grounds had been regularly begun, but this proviso shall not be construed to reopen the question of the determination of an heirship already ascertained by competent legal authority under existing laws: Provided

further, That said petition shall be verified, and in all cases arising hereunder service by publication may be had on all unknown heirs, the service to be in accordance with the method of serving non-resident defendants in civil suits in the district courts of said State; and if any person so served by publication does not appear and move to be heard within six months from the date of the final order, he shall be concluded equally with parties personally served or voluntarily appearing.

Sec. 2. That the lands of full-blood members of any of the Five Civilized Tribes are hereby made subject to the laws of the State of Oklahoma, providing for the partition of real estate. Any land allotted in such proceedings to a full-blood Indian, or conveyed to him upon his election to take the same at the appraisement, shall remain subject to all restrictions upon alienation and taxation obtaining prior to such partition. In case of a sale under any decree, or partition, the conveyance thereunder shall operate to relieve the land described of all restrictions of every character.